Supreme Court, U. S.
FILED
MAR 30 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1106

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

JOSEPH A. YABLONSKI, *et al.*,
Respondents.

BRIEF IN OPPOSITION

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March, 1972

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The petition for certiorari filed by the United Mine Workers of America is so totally devoid of any ground that would warrant this Court's review of the disqualification of its house counsel in this case that respondents are reluctant to burden the Court with a detailed statement of facts. Nevertheless, because the issue is whether this particular union house counsel is disqualified in the particular circumstances of this case

rather than whether union house counsel generally are disqualified in this type of action -- as petitioner would have this Court treat the case -- we have deemed it appropriate to set forth the full facts herein.

COUNTERSTATEMENT OF THE CASE

This action was brought in December 1969, by the late Joseph A. Yablonski and other UMWA members under Section 501 of the Labor-Management Reporting and Disclosure Act (LMRDA) against W. A. ("Tony") Boyle, John Owens and George Titler, the union's international officers, for an accounting and for restitution to the union of funds wrongfully misappropriated and misspent by them. The UMWA was named as a party defendant because it stands to obtain any funds repaid by the individual officers. The law firm of Williams & Connolly entered its appearance on behalf of both the union and the accused individual officers of the union and filed an answer and interrogatories on behalf of both. Plaintiffs moved to disqualify Williams & Connolly on grounds of conflict of interest; the firm withdrew from

representing the individual defendants but persisted in its representation of the UMWA despite the firm's representation of Boyle and the other officers in considerable related litigation. The district court denied plaintiffs' motion to disqualify Williams & Connolly from representing the union, but the Court of Appeals, on July 21, 1971, ruled that the representation of defendant Boyle in other cases required their disqualification here because "the UMWA needs the most objective counsel obtainable" (Petition, 19a) and because "the objectives of the Labor-Management Reporting and Disclosure Act would be much better served by having an unquestionably independent new counsel in this particular case" (Petition, 19a-20a).

The court premised its holding on Williams & Connolly's representation of Boyle personally in several different suits:

> "It is undeniable that the regular UMWA counsel have undertaken the representation of Boyle individually in many facets of his activities as a UMWA official, as a Trustee of the Fund, as a Director of the Bank owned 74% by the union. With

> strict fidelity to this client, such counsel could not undertake action on behalf of another which would undermine his position personally. Yet, in this particular litigation, counsel for the UMWA should be diligent in analyzing objectively the true interests of the UMWA as an institution without being hindered by allegiance to any individual concerned . . . . We think that the objectives of the Labor-Management Reporting and Disclosure Act would be much better served by having an unquestionably independent new counsel in this particular case. The public interest requires that the validity of appellants' charges against the UMWA management of breach of its fiduciary responsibilities be determined in a context which is as free as possible from the appearance of any potential for conflict of interest in the representation of the union itself" (Petition, 18a-20a).

Williams & Connolly withdrew its appearance for the UMWA the day after the Court of Appeals ruled on the disqualification question. Despite the fact that the general counsel of the union and his staff were tied in with the defendant officers far more directly than the already-disqualified firm of Williams & Connolly,

General Counsel Edward L. Carey and his staff promptly entered their appearances for the UMWA to replace Williams & Connolly. Plaintiffs filed the second motion to disqualify the following day.

Before the district court, in both memoranda and in oral argument, plaintiffs pointed out that if Williams & Connolly were disqualified because its representation of the individual defendants in other cases rendered it unable to represent the union's institutional interests objectively, then a fortiori, Carey and his staff were disqualified because of their even greater representation of the personal interest of the union officers in court and elsewhere.

(1) General Counsel Carey and his staff have represented and/or are representing the individual defendant officers of the union in numerous related cases:

(i) The mailing case, C.A. 1662-69: There had not been a genuine election contest for the presidency of the UMWA for more than 40 years when Yablonski announced his candidacy on May 29, 1969, and there had never been a mailing to the membership by one seeking office. When, during the nomination stage

of the election, Yablonski attempted to place his platform before the union membership through a mailing at his own expense as authorized by LMRDA (29 U.S.C. 481(c)), Boyle unilaterally denied this request. In its practical effect this refusal would have prevented Yablonski from making his candidacy and his position known to the membership, thereby preventing him from obtaining the endorsement of 50 local unions necessary for a place on the ballot and insuring the unopposed reelection of Boyle. When Yablonski brought suit against the union and its officers to vindicate his right to mail campaign literature, Carey and his staff represented both the union and the individual officers. Their attempted justification in the court below for this dual representation -- that there was an institutional interest in defending Boyle's refusal because otherwise "any number of people might bombard its membership with literature" -- leaves little doubt that it was Boyle (not the union) whose real interest was being protected.

(ii) The reprisal case, C.A. 1799-69: On June 6, 1969, one week after Yablonski announced his candidacy for the

UMWA Presidency, Boyle removed him from his position as acting director of Labor's Non-Partisan League, the lobbying arm of the UMWA. The practical effect of Yablonski's removal from this post and his reassignment by Boyle to work under the direction of a subordinate who was Mr. Yablonski's "long opponent" within the UMWA, was to remove him from a prestigious and highly visible position of national significance within the union and to stand as a warning to all union officers and employees that political opposition to Boyle would result in the loss of their jobs. In June of 1969, Yablonski brought suit against the union and Boyle for reinstatement. When Boyle was asked in the course of the taking of his deposition whether he had given Yablonski any warning of his firing, he replied: "Yablonski was on notice, plenty of notice, he gave his own warning on May 29" -- the day on which he announced his candidacy. General Counsel Carey and his staff represented both the union and Boyle in this suit. Obviously, the institutional interest here lay, as it did in the mailing case, with the enforcement of LMRDA and the reinstatement of Yablonski, which

the district court promptly ~~ordered~~. 1/

(iii) The Journal case, C.A. 2413-69: The first five editions of the UMW Journal, after Yablonski's candidacy announcement on May 29, 1969, included 166 references to and 16 pictures of Boyle; there were no references to Yablonski whatever. When Yablonski brought suit to correct this abuse of the union's newspaper by Boyle, General Counsel Carey and other house counsel sat at counsel table and assisted Williams & Connolly on behalf of both the union and the individual defendants. The district court found that "Defendants Boyle and McCarthy [the editor of the Journal] have used the Journal as a campaign instrument in favor of the candidacy of defendant Boyle." Yablonski v. UMWA, et al., 305 F. Supp. 868, 874 (D.D.C., 1969).

(iv) The fair election case, C.A. 3061-69: In October, 1969, Yablonski

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1/ On March 17, 1972, the Court of Appeals sent the reprisal case back to the district court for trial of the issue of Boyle's liability for punitive damages (No. 24,584). Carey, along with others, represented Boyle in the Court of Appeals.

brought suit against the union and the individual officers to secure a fair election by enforcing the guarantee contained in LMRDA and the union's constitution. When it became apparent that the union would commence printing and distributing ballots without a Yablonski observer present, counsel for Yablonski informed Carey that he would seek a temporary restraining order the following morning barring the unprotected printing of the ballots. Carey, having been informed of this contemplated action, directed the union printer to "get the job out as quickly as possible" (C.A. 3061-69, Tr. pp. 12, 29-30). 2/ While house counsel

2/ This effort to help Boyle by defeating the jurisdiction of the district court through printing the ballots overnight before the court could act is in line with Carey's unstinted devotion to the Boyle cause. For example, the complaint in this case makes specific reference to the charge that Carey attempted to persuade Miss Josephine Roche to forge John L. Lewis' name to a letter attacking Boyle critic, Ralph Nader. No denial of this act was made in the disqualification proceedings below. Then, too, plaintiffs pointed out below (Petition for Further Relief, p. 13, n. 8) that Carey testified in support of Boyle's denial of misrepresentation in engineering a pension increase during the 1969 election and that District Judge

/Footnote continued on following page./

suggested below that they played no significant role in the defense of this litigation, it is clear that Carey engaged in partisan activities which were designed to undercut the effect of that litigation.

(v) The disciplinary case; C.A. 546-71: The Yablonski faction of the UMWA was formally organized as the opposition party within the UMWA on April 1, 1970 (after Yablonski's death), when it adopted the name of Miners for Democracy (MFD) and organized a national association of reform-minded UMWA members. MFD, whose principal goals are fiscal and electoral reform within the UMWA, publishes its own newspaper, fields candidates in regional UMWA election contests, and has been outspoken

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2/ Footnote continued from preceding page. Gesell found that exactly the opposite had occurred. Blankenship v. Boyle, 329 F. Supp. 1089, 1107-1110 (D.D.C., 1971). See n. 5, infra. No reference is made to this occurrence in Carey's reply papers below. Efforts to undermine judicial action, persuasion to forgery and judicially discredited testimony, all on Boyle's behalf, hardly comports with even the most minimal standards of objectivity towards union institutional interests.

in its criticism of the incumbent officers. In March of 1971, five principal MFD supporters (including MFD candidates for District office) were ordered by Boyle to appear before the UMWA International Executive Board where, they were informed, a report would be delivered respecting an investigation of their intra-union activities. The practical effect of a disciplinary trial by a Board dominated by Boyle appointees would have stripped the MFD leaders of their union membership, possibly deprived them of their right to earn a living in the coal mines, and would have crushed the reform movement, all to the obvious benefit of Boyle and the incumbent officers. When MFD attorneys went before District Judge Gesell to seek a temporary restraining order against the union and the individual officers, Carey and his staff appeared for all the defendants, including Boyle, conceded to Judge Gesell that no report had been prepared, and, under threat of a temporary restraining order, agreed that the disciplinary trials would be postponed indefinitely. House counsel continues to act on behalf of both the union and the individual defendants in this case.

(vi) The "Loyal to Boyle" case, C.A. 1605-71: The UMWA constitution provides for a password for admittance to union meetings and the phrase chosen for the second half of 1971 was "Loyal to Boyle". The practical effect of requiring union members to state "Loyal to Boyle", Boyle's 1969 campaign slogan, before being granted permission to attend union meetings, is too obvious to require extended discussion. Significantly, however, UMWA house counsel, appearing for Boyle, Owens and the union, vigorously denied that Boyle selected the password, despite the fact that the UMWA constitution clearly provides that it is the responsibility of the president of the organization to designate the password. 3/

3/ House counsel argued below that "There was in fact no personal interest of Boyle and Owens at issue" in the Loyal-to-Boyle case (Memorandum In Opposition, p. 2). But there is no suggestion as to anyone else who might have had such a personal interest in that password and it is hard to conjure up any such interest.

(vii) The Boyle-Owens-Kmetz criminal case, Crim. Act. No. 346-71: Beginning in the Fall of 1970, a special grand jury was convened to investigate UMWA affairs. Witnesses from inside and outside the UMWA were called to give testimony. Answers to Interrogatories filed herein indicate that members of the house counsel's staff consulted with subpoenaed witnesses and accompanied them to grand jury proceedings. When Boyle and Owens were indicted for embezzlement of union funds, conspiracy and making illegal political contributions, they were represented at their arraignment by Carey and other house counsel. At this arraignment, the court was forced to cut short a peroration by Carey in defense of Boyle. For almost a month Carey and other house counsel remained the counsel of record for Boyle and Owens. Significantly, house counsel did not deny below that Mrs. Carey is engaged in soliciting funds to pay counsel fees and court costs incurred by defendants Boyle and Owens in these proceedings (Petiton for Further Relief, p. 8). Nor did they deny that they had engaged in consultations and discussions with later-retained outside counsel for

the defendants. Indeed, house counsel failed to advance -- as, indeed, they could not -- any institutional interest that the union might have in having its funds embezzled and spent for illegal purposes. In fact, Carey and staff have attended the trial and consulted with the defendants' retained counsel.

(viii) The pending election suit, C.A. 662-70: The Secretary of Labor brought suit in March, 1970, to upset the December 9, 1969 election of Boyle and the other International officers and to require a new election under the Secretary's supervision. While the union is the technical defendant in that case, it is the jobs of Boyle and the other officers that that are at stake. Carey and his staff are presently defending the case along with outside counsel.

(ix) The trusteeship case, C.A. 3071-64: The Department of Labor brought suit back in 1964 to dissolve the trusteeship status of certain UMWA districts wherein the district officers and representatives are appointed by Boyle rather than democratically elected by the rank and file members. While that suit, too,

is technically against the UMWA, what is at stake is Boyle's right to keep the districts in trusteeship and run the union autocratically through his appointees. Carey and his staff continue to handle the defense in that case.

* * *

Representation of the individual officers and their interests in this myriad of litigation is overwhelming ground for the disqualification of Carey and his staff from representing the union in the suit at bar to recover funds from those officers. But that is only the beginning.

(2) No less than three of the five lawyers who have entered appearances for the defendant union are specifically named in the complaint as having received monies as a result of breaches by defendants of their fiduciary duties:

Thus, paragraph 12 of the complaint alleges that Willard P. Owens and Harrison Combs of the general counsel's staff received unexplained "grants" of $10,000 and $5,000, respectively, in 1967. Paragraph 16 alleges that the defendant officers have "padded the UMWA payroll with

their own relatives who receive exorbitant salaries and expense allowances" not commensurate with the services, if any, rendered to the union. Among those specifically listed are Willard P. Owens and Ronald Owens, sons of defendant John Owens.

Paragraph 14 of the complaint alleges that defendant Boyle "using union personnel", later identified by plaintiffs as General Counsel Carey, attempted to persuade Miss Roche to forge John L. Lewis' name on a letter attacking UMWA critic Ralph Nader. Paragraph 38 alleges that Carey has failed to account to the union for the "substantial remuneration [received] from the National Bank of Washington for sitting on its Board of Directors." Finally, the entire staff of the union's general counsel is included in paragraph 13 which alleges that the individual defendants "have used and continue to use, attorneys on the payroll of the UMWA to defend themselves against justified charges of misuse of union funds and violations of federal law."

(3) Moreover, there are strong personal ties between the lawyers on the general counsel's staff and the defendant officers which would prevent each and all of them from objectively assessing the union's institutional interest in this case:

One obvious instance is Willard P. Owens, who is the son of defendant John Owens. Willard P. Owens could hardly be expected to objectively evaluate the union's institutional interest on any occasion where that interest might collide with his father's, for it is his father who might be required to make restitution to the union's treasury for any wrongdoing found.

Similarly, house staff attorney Charles Widman, son of UMWA Director of Organization, Michael Widman, has a plain conflict of interest. Plaintiffs have charged in paragraph 20 of the complaint that millions of dollars of union funds have been misappropriated in the name of "organization expense." Like Willard P. Owens, Charles Widman would not be able to objectively evaluate the union's interest, because an objective evaluation might compel him to

take a position which might implicate his father in unlawful conduct.

The position of Harrison Combs is similar. Within the time frame this suit covers, Combs had no less than five close relatives on the union payroll, two sons, Kenneth and Harrison, Jr., a brother, Matt, a daughter-in-law and a son-in-law. 4/ His objectivity might be compromised in the event any of his relatives were involved in wrongdoing.

Carey, the chief counsel, has ties with Boyle and his faction even stronger than the familial ties of his subordinates. In addition to his role as the union's chief lawyer, Carey is Boyle's chief lieutenant, policy maker and public spokesman in the struggle between the Boyle group and the MFD reform elements in the union. His role in union affairs is far more than legal representation; his flamboyant vilification of the Yablonski forces appears in every UMWA Journal which is mailed at union expense to all union members. A few

4/ At the present time, Combs has only one relative on the union payroll, the Boyle-appointed Secretary-Treasurer in UMWA District 20.

examples from the UMWA Journal, cited below, illustrate beyond peradventure of doubt Carey's overwhelming partisanship and ties of loyalty to the defendant officers.

Thus, on March 1, 1970, the Journal reprinted a letter sent by Carey to W. J. Usery, Jr., Assistant Secretary of Labor, which letter included the following remarks:

> "The present International Officers will, as always, be guided by the desires of their constituents. * * * Messrs. Boyle, Titler and Owens shall never abdicate. They intend to represent the membership and speak out courageously on the issues of the day. 'God willing', as long as their health permits . . . ."

On July 1, 1970, the Journal reported that Carey introduced Boyle at a rally in District 28 where the theme of the day was unity within the UMWA. Among Carey's remarks that day as reported in the Journal are the following:

> "The General Counsel said the UMWA was against dissent only if the purpose of such dissent was destruction. 'They /the Yablonski reform group/ were beaten and just cannot accept defeat', Carey said,

> We do not intend to let these fakers destroy our union. 'They are,' he said, 'a very insignificant minority organized by outsiders who never contributed anything to the UMWA.'"

On June 15, 1971, the Journal reported that Carey addressed the Policy Committee attacking the reform group within the UMWA. Commenting at the same time on Judge Gesell's opinion in the Blankenship v. Boyle case, [5] Carey (according to the Journal report) said:

5/ Civil Action No. 2186-69. On April 28, 1971, District Judge Gesell issued an opinion in that case in which he found that Boyle had engineered a pension increase at a meeting of the Board of Trustees of the pension fund during the 1969 election campaign by misrepresenting to Trustee George Judy that he had Trustee Roche's proxy. "Judy would not have voted for the increased pension", Judge Gesell found, "if he had not been falsely led to believe by Boyle that Boyle had Roche's proxy." 329 F. Supp. at 1109. In making this finding, Judge Gesell discredited the testimony of both Boyle and Carey directly to the contrary. 329 F. Supp. at 1109. Carey had testified that he was present in the room when Boyle and Judy discussed the increase and that "There was no discussion at all about Miss Roche's voting or whether Boyle had a proxy or what have you." Tr. 1991. Carey also denied, in answer to a direct question from the court, that there had been any discussion of Miss Roche's attitude. Ibid.

"'President Boyle got shocking treatment from the court when it decreed he must be removed from the Fund's Board of Trustees.' "

Carey has so tied himself to Boyle that his own future depends on Boyle's; his partisanship in the internal union struggle is so complete that he could never effectively represent the union when the union's interest was with the reform group and different from Boyle's. We pointed out below that "In the five years that Carey has been general counsel of the UMWA, plaintiffs are unaware of a single instance, in court or in public, that Carey has not viewed Boyle's interest and the union's as identical" (Petition for Further Relief, p. 14). In response, Carey could cite no single instance of divergence from Boyle.

* * *

The district court, despite this massive chronicle of conflict of interest, both actual and potential, declined to grant plaintiffs' disqualification motion. The district court apparently recognized that it was not following the mandate in the earlier disqualification of Williams & Connolly, for he stated, "I know that you will go upstairs and I will probably be

reversed but nevertheless that is my decision" (Tr. p. 28).

Plaintiffs promptly filed a Petition for Further Relief in the Court of Appeals to enforce that Court's prior opinion and mandate under the all-writs clause (28 U.S.C. § 1651). The Court of Appeals ruled for plaintiffs, stating:

> " . . . house counsel as a group do not fit the specifications we previously laid down for those who would undertake representation of UMWA in this cause. They simply are not 'unquestionably independent new counsel' whose contemplated appearance would enable resolution of the issue 'in a context which is as free as possible from the appearance of any potential for conflict of interests in the representation of the union itself.' It follows that the license the District Court gave them to remain union counsel is a grave departure from the terms of our prior mandate, and sounds the call for corrective action here" (Petition, 7a-8a.)

ARGUMENT

Because the statement of the facts has been long and because it fully demonstrates the actual and potential conflicts of interest in this case, the Argument can be short.

The UMWA's First Amendment contention, predicated upon this Court's decisions in NAACP v. Button, 371 U.S. 415 (1963); Bro. of Rr. Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964); and UMWA, District 12 v. Illinois State Bar Assn., 389 U.S. 217 (1967), is without substance; the court below held that this particular house counsel, not house counsel generally, were disqualified. What was at issue in the cited cases was, in effect, a general disqualification of house counsel; what is at issue here is the particular conflict of interest of Carey and his staff and that has been fully demonstrated. 6/

Bro. of Rr. Trainmen, supra, and UMWA, District 12, supra, involved state regulations of the practice of law which barred

6/ Indeed, the UMWA thought so little of this point that it never raised it in the district court or in the court below until the adverse decision had been rendered by the court and a petition for rehearing en banc was filed. As the clerk of the court below informed the union, "your suggestion for rehearing en banc was transmitted to the full Court, and no Judge has requested a vote thereon" (Petition, p. 2, n. 3). (Emphasis supplied.)

representation of union members in connection with their individual workmen's compensation claims by union-retained attorneys. This Court's holdings, that such regulations violated the members' First Amendment right to associate for common purposes, are not relevant here. In this case, officers of the UMWA have been charged with serious breaches of their fiduciary obligation to the union as an institution and to its members. Consequently, the interest of the members -- like that of the union itself -- is in representation of the union by counsel who can act objectively and independently. The Court of Appeals disqualification of house counsel, in the particular circumstances of this case, in no way infringes on the members' rights of association. The Courts of Appeals have uniformly held that the defense of individual officers charged with wrongdoing may not be paid out of union funds; what the officers may not enjoy directly, they are also barred from enjoying indirectly through representation of the union by attorneys so tied to the accused wrong-doers that they cannot represent the union objectively and independently, Milone v. English,

113 U.S. App. D.C., 306 F.2d 814 (1962); Tucker v. Shaw, 378 F.2d 304 (C.A. 2, 1967).

As to the UMWA contention that the court below was without jurisdiction, the decisions of this Court on this point have been clear since 1838 when this Court instructed that an inferior federal court is bound to apply a mandate from the appellate court, and if it does not do so, then 'a mandamus or other appropriate writ will go." Sibbald v. United States, 37 U.S. 488, 492-493. See also, Delaware, L. & W. R.R. v. Rellstab, 276 U.S. 1, 3 (1928); In re Blake, 175 U.S. 114, 117 (1899); United States v. District Court, 334 U.S. 258, 263-264 (1948). The court below held that the district court's action in permitting Carey and his staff to represent the union "is a grave departure from the terms of our prior mandate" (Petition, 7a-8a); having so found, its exercise of jurisdiction is completely in line with this Court's decisions for more than a century.7/

7/ Actually the court below would have had jurisdiction under the all-writs statute (28 U.S.C. § 1651) even if the matter had been there for the first time. Cord v. Smith, 338 F.2d 516, 521-522 (C.A. 9, 1964); Chugach Elec. Assn. v. District

[Footnote continued on following page.]

Finally, UMWA argues that the court below erred in rejecting the findings of the district court. But there were no findings by the district court, only a statement that the court believed "a passive role" was in store for the UMWA in this case. As the Court of Appeals noted on this score:

> "The short answer is that on that basis [7] the law firm originally retained as union counsel was not disabled from continuing in that capacity. Our holding that it could not be permitted to do so necessarily ruled out the theory which the District Court saw fit to adopt. The court was not at liberty to utilize as ground for a fresh determination a consideration which our earlier decision had already implicitly discarded." (Petition, 8a.)

7/ [Footnote continued from preceding page.] Court, 370 F.2d 441 (C.A. 9, 1966). But that question is not presented because here "all-writs" relief is necessary to enforce the mandate of the court below in its initial decision concerning the disqualification of Williams & Connolly.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

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